United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

74-2551
74-2552
74-2553

Signed

74-2551

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

VIVIEN KELLEMS,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEALS FROM THE DECISIONS OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
GARY R. ALLEN,
ROBERT A. BERNSTEIN,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

TABLE OF CONTENTS

CITATIONS

Cases:

Statute:

Miscellaneous:

Page

IN THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 74-2551

VIVIEN KELLEMS,

Appellant

v.

COMMISSIONER OF INTERNAL REVENUE,

Appellee

ON APPEALS FROM THE DECISIONS OF THE UNITED STATES TAX COURT

BRIEF FOR THE APPELLEE

STATEMENT OF THE ISSUE PRESENTED

Whether the Tax Court acted within its discretion when it granted a motion for dismissal for failure to properly prosecute.

STATEMENT OF THE CASE

These appeals involve three separate cases, consolidated for trial in the Tax Court, relating to deficiencies in federal income taxes for the taxable years 1966 through 1971, in the total amount of $86,257.76, plus additions to tax. The decisions of the Tax Court (Judge Darrell D. Wiles) were entered on

August 7, 1974. (R. 100-105.)[1/] Notices of appeal were timely filed on October 29, 1974.[2/] (R. 3, 8, 11.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts may be summarized as follows:

In each of the petitions filed by taxpayer with the Tax Court, taxpayer alleged that the Commissioner's determination of her tax liability was unconstitutional on the grounds that, because she was an unmarried person, her liability was computed in a manner less favorable to her than if she had been a married person. An earlier case brought by taxpayer involved the same contention, but related to the taxable year 1965. That case was decided adversely to taxpayer, the decision becoming final during the pendency of the instant action.

1/ Taxpayer did not file a record appendix in accordance with Rule 30 of the Federal Rules of Appellate Procedure. In order to assist the Court, the Commissioner has prepared a separately bound record appendix. "R." references are to that record appendix. For the convenience of the Court, the entire transcript of the proceedings of July 25, 1974, which ended in the orders of dismissal at issue here, is reproduced in the record appendix.

2/ According to published news reports, taxpayer in this case died on January 25, 1975, after the appeal was docketed and her brief filed. A suggestion of death was submitted for filing by the Government on January 28, 1975. To the Government's knowledge, no motion to substitute parties has been filed yet.

Kellems v. Commissioner, 474 F. 2d 1399 (C.A. 2, 1973), cert. denied, 414 U.S. 831 (1973). (R. 1, 5, 9, 13, 93.)

For the years 1968 through 1971, taxpayer filed essentially blank income tax returns containing only her name, address and signature. Accordingly, taxpayer's income and deductions for those years were reconstructed by the Commissioner from third-party records. (R. 19-20.) In addition to the deficiencies in taxes based on such reconstruction of taxpayer's taxable income, the Commissioner also asserted deficiencies for additions to tax under Sections 6651(a), 6653(2) and 6654 based on taxpayer's failure to timely file returns for these years and her failure to pay taxes and estimated taxes for such years when due. (R. 103, 105.) (No additions to tax were asserted to be due for the years 1966 and 1967, for which returns were filed. The deficiencies in tax for these years was based on a disallowance of a portion of the medical expense deductions claimed on her returns and on a recomputation of her gains from the sale of capital assets for these years and of her loss, and allowable deduction for expenses of sale, of certain business property reported for 1967.) Taxpayer's attorney advised her to plan to settle the instant cases after the case involving the year 1965 was decided; and the attorney expressly indicated to the Tax Court that taxpayer did not intend to litigate the later years in view of the fact that she was essentially interested only in the constitutional question. (R. 13, 78.) Certiorari was denied by the Supreme

Court in the 1965 tax year case on October 9, 1973. Taxpayer nevertheless continued the instant litigation, but on a pro se basis after November 12, 1973, when her attorney was permitted to withdraw as counsel. (R. 15-17.)

On her own behalf, taxpayer entered into a stipulation of facts containing 18 items, and a first supplemental stipulation containing one item, on April 11, 1974 (R. 18-25.) A second supplemental stipulation of facts containing items No. 20 through 39, was prepared by the Commissioner and originally rejected by taxpayer. (R. 18-22.) However, on April 22, 1974, in response to an "Order to Show Cause Under Rule 91(f)," taxpayer wrote the Tax Court that she had "decided to exercise my woman's prerogative to change my mind" and agreed to stipulate to items No. 20 through 38 of the second supplemental stipulation of facts. (R. 23.). An order to that effect was entered by the Tax Court on May 1, 1974. (R. 24.) Item No. 39 of the second supplemental stipulation of facts (containing information taken from taxpayer's own tax return for 1967) was subsequently ordered admitted by the Tax Court at the hearing on July 25, 1974. (R. 68.)

After the cases were consolidated, they were calendared for trial on June 3, 1974. Prior to the call of the calendar, taxpayer informed the clerk of the court that she was ill and could not appear at the calendar call. She also telephoned counsel for the Commissioner, and asked that the trial be set for June 5 or 6, 1974. Accordingly, the cases were set

for trial on June 6, 1974. On June 5, 1974, taxpayer telephoned the clerk to state that she was still ill and could not appear the following day, but that she was "anxious to have her case tried." At a hearing on June 5, the court granted a further postponement and stated it would attempt to try the cases later in June on the same calendar. When this became impossible because of other trials on the calendar, taxpayer's cases were restored to the general docket. (R. 27-30, 32-33.)

On June 26, 1974, taxpayer joined with the Commissioner in a motion to calendar the cases at a special session any time between July 8, 1974, and July 26, 1974. The motion recited that the "parties are anxious to try these cases" and estimated that trial time would be "half a day or less." Accordingly, the case was set for trial at a special session called on July 25, 1974. (R. 34-35.)

Although she had been in frequent contact with counsel for the Commissioner during the preceding weeks, taxpayer did not at any time indicate that she would not be prepared to proceed on the merits on the scheduled date. (R. 79-80, 101, 103, 105.) At the July 25 hearing, she appeared in person; after some preliminary discussion, she moved for a jury trial and presented a lengthy oral argument in support of her request. (R. 40-65.)

When she finished her presentation, and the court attempted to move on to the merits of the case, taxpayer stated that she did not want to do so. She said that she had been ill and that "I'm not prepared to discuss these figures and I don't want to until I have my accountant with me." When asked by the court as to why she had not brought her accountant with her, she replied, "Because I'm not prepared to go into this case until we adjudicate this question of a jury trial." (R. 67.)

The court recessed for 30 minutes to consider taxpayer's request for a jury trial, after which it announced its decision to deny the request and quoted excerpts from various precedents supporting its decision. (R. 68, 73-75.) The court then asked whether taxpayer was ready to proceed with the merits. (R. 76-77.) She said that she would need an extension of three to six weeks and that "I'm just not physically able to do it today, and I'm not prepared." (R. 77-78.) Discussion ensued, during which Government counsel pointed out that most of the relevant facts have been stipulated. (R. 78-82.) At one point, the court asked whether taxpayer would be prepared to try the case that afternoon, but was told that "I'm not physically able to do it." (R. 87.) The court declared it would entertain a motion to dismiss for want of prosecution, and the motion was made and granted. (R. 87.) Decisions were therefore entered sustaining the deficiencies asserted by the Commissioner. (R. 100-105.)

Taxpayer filed in each case a "Motion to (1) Vacate Decision, (2) Reconsider Order of Dismissal, and (3) Grant Hearing on Merits," which was denied by the Tax Court. (R. 106-111.) Taxpayer thereupon brought these appeals.

SUMMARY OF ARGUMENT

The sole question presented by this appeal is whether the Tax Court abused its discretion in granting the Commissioner's motion to dismiss for failure to properly prosecute. This Court recently described the scope of review in such a case as "extremely narrow." Here, in any event, there was ample justification for the court's action.

Trial of the case had been postponed several times, twice at the sole request of the taxpayer. The last hearing was a special session of the court, called solely to hear taxpayer's case and prompted by a joint motion of the parties specifically requesting an early special session. The facts at this point had been almost entirely stipulated. Although taxpayer was in frequent contact with government counsel during the period preceding the trial date, she did not ever indicate that she would not be prepared for a trial on the merits on the scheduled date.

At the hearing, after asking and receiving the court's indulgence to make a preliminary statement, taxpayer delivered a carefully-prepared 35-minute oral presentation requesting a jury trial (which she had not previously requested or indicated any intent to request). Only then, and for the first time, did she state that she was unprepared to proceed on the merits.

These events, plus various statements made by the taxpayer during the course of the hearing, could reasonably be interpreted as indicating that she was interested, not in resolving the few remaining factual issues, but only in pressing her constitutional claims.

The only grounds asserted by taxpayer for further delay was that her lack of preparedness was due to illness. However, she was physically capable of preparing the lengthy jury-trial argument. And in any event, illness could not justify her failure to notify either the court or Government counsel of her intent (a) not to proceed with the matters for which the hearing had been set, and (b) to present, instead, and for the first time, a purely legal argument which would not have warranted a special court setting.

ARGUMENT

DISMISSAL OF THE CASE FOR FAILURE TO PROPERLY PROSECUTE WAS A PROPER EXERCISE OF THE TAX COURT'S DISCRETION

Taxpayer's case was dismissed under Rule 123(b) of the Rules of Practice and Procedure of the United States Tax Court [3/] (January 1, 1974), Appendix, infra. Rule 123(b)

3/ Specific statutory authority for the Tax Court's adoption of Rules of Practice and Procedure is conferred by Section 7453 of the Internal Revenue Code of 1954 (26 U.S.C.).

reads, in part, as follows:

> (b) Dismissal. For failure of a petitioner properly to prosecute or to comply with these Rules or any order of the Court or for other cause which the Court deems sufficient, the Court may dismiss a case at any time and enter a decision against the petitioner.

Rule 123(b) became effective only recently, on January 1, 1974, and there apparently has as yet been no occasion to interpret it. However, the former Tax Court rules also provided for dismissal for failure to properly prosecute, present proof, etc. (Rules 7(a)(2), 27(c)(3), and 31(g) of the Rules of Practice, United States Tax Court (Rev. 1958, 1971 ed.), Appendix, infra), and the exercise of such power to dismiss has been consistently upheld by this and other appellate courts.[4/] See Miller v. Commissioner, 300 F. 2d 760 (1962); Visceglia v. Commissioner, 311 F. 2d 946 (C.A. 3, 1963); Bree v. Commissioner, 368 F. 2d 116 (C.A. 8, 1966). Moreover, the wording of present Rule 123(b) is similar to that of Rule 41(b) of the Federal Rules of Civil Procedure, Appendix, infra, and, in any event, the power of a court to dismiss an action for want of prosecution "is of ancient

---

4/ An appeal from a dismissal under the former rules is now pending in this Court in Benjamin v. Commissioner, No. 74-2083.

origin," and does not necessarily depend upon express statutory authority. Link v. Wabash Railroad Co., 370 U.S. 626, 630 (1962). Accordingly, the nature and scope of Rule 123(b) presumably are established both as a matter of tradition and federal practice. See generally, 5 Moore's Federal Practice (2d ed.), par. 41.11.

It is well settled that "neither a dismissal with prejudice for failure to prosecute nor a refusal to vacate such a judgment will be reversed on appeal except for abuse of discretion." Redac Project 6426, Inc. v. Allstate Insurance Co.,412 F. 2d 1043, 1046 (C.A. 2, 1969). Thus, this Court has recently described the scope of review over an order of dismissal as "extremely narrow." Theilmann v. Rutland Hospital, Inc., 455 F. 2d 853, 855 (1972).

In this case, the court's action was based on substantial grounds. The case had been subject to a calendar order issued on February 25, 1974. (R. 79.) Several continuances had been granted, two of them at taxpayer's request. (R. 27, 28, 32.) The final trial date was a special session of the court called solely to hear taxpayer's case. Taxpayer had, in fact, told the clerk of the court that she was anxious to have the case tried, and she had joined in a motion with Government counsel requesting the special setting. (R. 27, 34-36.) The motion asked that the hearing be set within a specified period of time (between July 8, 1974, and July 26, 1974),

and that request was accommodated by the court. (R. 34, 37-87.) Taxpayer was in frequent contact with Government counsel during the period immediately preceding the trial date, without ever indicating that she was not, or would not be, prepared for trial. (R. 79-80, 101, 103, 105.)

On the day of trial, taxpayer was extremely well prepared for her presentation of the contention that she was constitutionally entitled to a jury trial. Moreover, she was physically capable of arguing the constitutional point for 35 minutes, and she stated that she planned to meet with Congressman Mills that same afternoon following the Tax Court proceeding regarding legislation in which she was interested. (R. 63.) Nevertheless, she declared herself unprepared to proceed on the merits -- despite the fact that virtually all issues in dispute had been resolved by stipulation and she had agreed that the merits could be disposed of in half a day or less. (R. 35, 81.)

On at least three occasions at trial, taxpayer made statements from which it could reasonably be inferred that she had made no attempt to prepare for a hearing on the merits, but instead viewed the trial setting solely as an opportunity to

express her jury-trial views.[5] In fact, her conduct of her case generally might reasonably have been interpreted by the Tax Court as indicating that she was not seriously interested in litigating the factual aspects of the case. This implication is strengthened by a statement of taxpayer's attorney in a document[6] filed with the Tax Court prior to his withdrawal as counsel; there, he stated that, once taxpayer's earlier case involving the tax year 1965 (then pending on appeal) was decided, "it is expected that all of Miss Kellems' cases * * * will be settled without further litigation." (R. 13.) (Emphasis in original.) In short, there is substantial indication in the record to support the inference that taxpayer was not seriously interested in anything other than her constitutional claims.

Taxpayer's conduct of her case unquestionably was sincerely motivated and well intentioned. But her deeply held convictions led her to persist, contrary to the request of the court, in presenting her lengthy jury-trial argument orally rather than

---

5/ For example, she told the Tax Court at one point (R. 67) that "I'm not prepared to discuss these figures and I don't want to until I have my accountant with me." Later, she declared (R. 77): "I had a blood transfusion in order to come here today. I felt that it was of such importance to get this before the Court, and also, when I am ready[,] to try the other." At another point, she stated that a tax return "is completely beyond me," adding: "However, I have had an excellent accountant go over them, and at the proper time I shall be glad to discuss them. But before doing so, these two issues must be settled by the Congress and by the Courts." (R. 64.) (Emphasis added.)

6/ The document was entitled "Memorandum in Opposition to Respondent's Motion for Further and Better Statement in Petition or to Strike and to Strike in Part." (R. 13.)

reserving it for her brief,[7] and to disregard entirely the purpose for which the court had been convened (and of which she had been duly apprised). Accordingly, although well intentioned, her conduct of her case had the effect of "Trifling with the * * * court's time," insofar as a final resolution of the factual issues was concerned.[8] Redac Project 6426, Inc. v. Allstate Insurance Co., supra, p. 1047.

The facts here are similar to those in Schwarz v. United States, 384 F. 2d 833 (1967), in which this Court affirmed a District Court's dismissal of a case for failure to prosecute. There, as here, a critical factor was plaintiff's failure to advise the court, sufficiently prior to the trial date, of

---

7/ At one point, when the court attempted to move on to other matters, taxpayer stated that "I must insist, if you please, that I be permitted to present this case." Shortly thereafter, the court advised her that she could "make all the constitutional arguments your heart desires" in her brief. However, she again insisted on continuing the jury-trial argument, and the court again acquiesced. (R. 55.)

8/ Taxpayer's brief here (p. 4), seems to suggest that she was wrongfully and deliberately "harassed" by the Internal Revenue Service in connection with this case; that a full hearing was necessary to demonstrate this fact; and that the Tax Court was apprised of the relevant factual background (and presumably, therefore, of the need for a full hearing) in a memorandum filed by taxpayer in connection with an earlier proceeding in the case. See fn. 6, supra. That proceeding arose out of the Government's initial attempts to develop more of the facts necessary to a determination of the taxpayer's tax liability, whereas virtually all of the essential facts were later stipulated. Accordingly, it is difficult to perceive the relevance here of the allegations as to "harassment" and of the contents of the earlier memorandum, since it would appear that the only unresolved issues had to do with the basis of three properties sold by taxpayer and the allowability of certain claimed medical expense deductions. (R. 82.)

his inability to proceed with trial. The Court stated (p. 835):

> It is hard to see how plaintiff can contend that it was an abuse of discretion for Judge Murphy to rule that the circumstances set out above showed inexcusable neglect, especially in light of the fact that it must have become apparent to plaintiff's counsel well in advance of January 19 that they could not proceed to trial on the 20th. Yet they waited until the 19th, the eve of the trial date, before attempting to advise the court of that fact.
>
> We have found no case of reversal by an appellate court of a District Court's exercise of discretion in circumstances such as these.

The circumstances here are even stronger in support of the dismissal than in Schwarz. Here, taxpayer obviously was able to devote some pretrial time and energy to her case (since she prepared an extensive oral argument on the constitutional issue),[9/] whereas in Schwarz, it was conceded that plaintiff's attorneys had been unavoidably overburdened with other matters during the period immediately preceding the trial date.

It is true that taxpayer was not an attorney and was prosecuting her case pro se. Presumably, however, the lack of representation was by choice, and it would not in any event appear to excuse her failure to prepare. If anything, a dismissal is a harsher remedy when applied to a person who is

---

9/ When taxpayer was informed she could make the constitutional argument on brief (see fn. 7, supra), she replied: "That may be, You Honor, but I have prepared this. It's extremely important." (R. 55.)

represented by counsel, and who thereby is caused to suffer as a result of the fault of his lawyer, than when applied against the dilatory party herself. Cf. Schwarz v. United States, supra, p. 836.

On brief here, and in her motion to reconsider the order of dismissal, taxpayer stated that she was ill and therefore unable to prepare for the July 25, 1974, hearing. By this, taxpayer apparently meant she was unable to prepare both for her constitutional argument and for the trial on the merits, since she clearly was able to do the former. We can only point out that there is no indication that taxpayer was not fully aware of the nature of the proceeding (see R. 77), and suggest that her obligation to the court, at a minimum, was to give prior notice of her decision not to proceed with trial. Nevertheless, as the court was advised, taxpayer at no time--at personal conference, by letter, by motion, or during the pretrial telephone conversations which she held with Government counsel--indicated either that she intended to request a jury trial or that she did not intend to proceed on the merits. And on the day of trial (although, in all likelihood, unintentionally), taxpayer misled the court at the outset into assuming that she would be ready to try the

case once she completed her jury-trial argument. 10/ We submit, then, that the circumstances fully warranted a dismissal for failure to properly prosecute and that the Tax Court below did not abuse its discretion in inviting and granting the Commissioner's motion in this regard.

CONCLUSION

For the reasons stated, the decisions of the Tax Court should be affirmed.

Respectfully submitted,

SCOTT P. CRAMPTON,
Assistant Attorney General,

GILBERT E. ANDREWS,
GARY R. ALLEN,
ROBERT A. BERNSTEIN,
Attorneys,
Tax Division,
Department of Justice,
Washington, D.C. 20530.

FEBRUARY, 1975.

10/ After preliminary discussions, taxpayer stated: "Before proceeding with this trial, I wish to make a request and read a short statement." (Tr. 41.) A reading of the transcript as a whole makes it clear that the court granted permission for her oral presentation only because he believed it to be preliminary to a trial on the merits.

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on the appellant, appearing pro se, by mailing four copies thereof on this 20th day of February, 1975, in an envelope, with postage prepaid, properly addressed to it as follows:

Estate of Vivien Kellems
Newberry Road
East Haddam, Connecticut 06423

Gilbert E. Andrews/pmd

GILBERT E. ANDREWS
Attorney.

APPENDIX

Federal Rules of Civil Procedure:

Rule 41. DISMISSAL OF ACTIONS

* * *

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. * * *

* * *

Rules of Practice, United States Tax Court (Rev. 1958, 1971 ed.):

RULE 7. INITIATION OF A CASE--PETITION--FILING FEE--FORM

(a) Petition.--

* * *

(2) Improper petition--Dismissal.--Failure of a petition to comply with this Rule or with Rule 4 or 6 shall be ground for dismissal of the case.

* * *

RULE 27. PLACE, TIME, AND NOTICE OF HEARINGS AND TRIALS--ATTENDANCE AND CONTINUANCES

* * *

(c) Trial calendars.--

* * *

(3) Attendance at trials.--The unexcused absence of a party or his counsel when a case is called for trial will not be the occasion for delay. The case may be dismissed for failure properly to prosecute or the trial may proceed and the case be regarded as submitted on the part of the absent party or parties.

* * *

RULE 31. EVIDENCE AND THE SUBMISSION OF EVIDENCE

* * *

(g) Failure of proof.--Failure to adduce evidence in support of the material facts alleged by the party having the burden of proof and denied by his adversary, may be ground for dismissal. * * *

Rules of Practice and Procedure of the United States Tax Court (January 1, 1974):

Rule 123. Default and Dismissal

* * *

(d) Dismissal. For failure of a petitioner properly to prosecute or to comply with these Rules or any order of the Court or for other cause which the Court deems sufficient, the Court may dismiss a case at any time and enter a decision against the petitioner. The Court may, for similar reasons, decide against any party any issue as to which he has the burden of proof; and such decision shall be treated as a dismissal for purposes of paragraphs (c) and (d) of this Rule.

* * *